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**VALIDITY OF A REZONING ORDINANCE
IN MARYLAND**

***Kracke v. Weinberg*¹**

A bill of complaint for a declaratory decree was filed by the appellees, husband and wife, against the Mayor and City Council of Baltimore for the purpose of having a rezoning ordinance² declared invalid as applied to the property of the plaintiffs. The realty in question consisted of approximately 3 acres of unimproved land, traversed by streams

¹ 79 A. 2d 387 (1951).

² Ordinance No. 510, Approved July 10, 1946.

and bounded on the northeast by a "paper" street which was between it and the Pennsylvania railroad. Originally in March of 1931, Ordinance No. 1247 was passed, zoning this property as 2d Commercial. It remained so until July, 1946, when Ordinance No. 510 was passed, rezoning to residential the general area in which plaintiff's property was located. The bill contended that plaintiffs' land had no value for, and was totally unsuited for, residential purposes and that the ordinance amounted to a taking of plaintiffs' land without due process. The Chancellor ruled that the Ordinance was void and invalid insofar as it pertained to the appellee's property because it amounted to a taking without due compensation. It was from this ruling that an appeal was taken.

From the facts of the case as presented to the Court of Appeals, it appeared that to use the land in question for residential purposes, a street would have to be built, a foundation could not be easily found for the houses, the stream would have to be taken care of with heavy pipes, and any residential builder would run into such prohibitive costs that he would go bankrupt. It also appeared that the ordinance was passed as a result of a demand on the part of residents of Wilhelm Park that they should be protected by preventing the construction of any commercial and industrial developments on the land between them and the railroad and Wilkens Avenue.

The Court of Appeals affirmed the lower court and in doing so stated:

"Where property is rezoned, it must appear that either there was some mistake in the original zoning, or that the character of the neighborhood has changed to such an extent that such action ought to be taken. Neither situation is present in the case before us. The property has always been commercial and apparently there is little chance of its ever being used for residence purposes. Rezoning to residential results in preventing the owners from using it, not only for its most suitable use, but for any practical use at all. Under these circumstances, their property is being taken from them without compensation, and we think the ordinance was void as to it."³

In order to properly appreciate the import of the constitutionality of a rezoning ordinance, it would be advantageous to briefly scan the development of the zoning laws

³ *Supra*, n. 1, 391.

in Maryland from a constitutional aspect. The early history of the validity of municipal zoning ordinances was rather sketchy and undependable, since the courts looked for some expression of the people's will either from an act of the state legislature or from an article in the state constitution before legalizing any zoning ordinance.⁴ Most of the courts, Maryland's included, were reluctant to uphold any zoning ordinance without the adoption of a State Enabling Act by the legislature.⁵ In the period from 1916 to 1928 some cities, including Baltimore, felt that their home rule charters were sufficiently broad to cover the enactment of zoning regulations without further authority from the state. The Maryland Court of Appeals, however, did not fall in line with this theory and considered them unreasonable⁶ and too liberal an application of the police powers of the state.

Much valuable time was lost by these futile attempts to adopt zoning ordinances without an enabling act.⁷ Then Maryland's first Enabling Act was passed,⁸ and the initial conflict with the courts (i.e., the problem of municipal power to enact zoning laws) was overcome. The only question remaining was the extent to which the police power of the state would be used by way of building restrictions, etc., through the zoning ordinances. When the majority of states, including Maryland, had adopted such legislation,⁹ it became apparent that the major problems were the requirements of the "Due Process" and "Equal Protection" clauses of the 14th Amendment to the Constitution. Any hesitancy the Courts may have had in approving the constitutionality of restricted residential use districts, however, was overcome when the Supreme Court of the United States reversed the United States Court of Appeals in the *Village of Euclid v. Ambler Realty Company*¹⁰ case and held that under the police powers specific residential use districts excluding any and all industrial

⁴ BASSETT, ZONING (1940), p. 13.

⁵ *Goldman v. Crowther*, 147 Md. 282, 128 A. 50 (1925).

⁶ *Applestein v. M. & C. C. of Baltimore*, 156 Md. 40, 143 A. 666 (1928); *Bauernschmidt v. Standard Oil Co.*, 153 Md. 647, 139 A. 531 (1927); *State v. Rutherford*, 145 Md. 363, 125 A. 725 (1922).

⁷ BASSETT, *supra*, n. 4, pp. 14-17, "Home Rule Charters".

⁸ Md. Laws 1927, Chapter 705, Md. Code 1951, Art. 66B, Secs. 1-9. See also: Md. Code, Art. 66B, Secs. 21-37.

⁹ Sec. 3 of the Zoning Enabling Act, *ibid.*, provides, inter alia, with reference to zoning regulations:

"Such regulations shall be made in accordance with a comprehensive plan and . . . with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of Buildings and encouraging the most appropriate use of land throughout such municipality."

¹⁰ 272 U. S. 365, 54 A. L. R. 1016 (1926).

buildings were valid. Justice Sutherland in that case lays down the very broad principles governing the constitutionality of zoning ordinances which have served as a guide to the courts since. This case was the foundation stone of the majority rule today that in passing upon the constitutionality of a zoning ordinance, enacted as a police measure, the court will not substitute its opinion for that of the legislative body, which is charged with the responsibility of determining the question, *where the question is fairly debatable*, unless the ordinance is clearly arbitrary and unreasonable, having no substantial relation to the public health, morals, or public welfare.¹¹ The power of a municipal or county governing body to zone is not unlimited,¹² however, and in *Nectow v. Cambridge*,¹³ the Supreme Court held that particular use classifications may be set aside, where it is shown "that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the *locus* in question".¹⁴

The Maryland Court of Appeals in the recent case of *Cassel v. Mayor and City Council of Baltimore*,¹⁵ further outlined the constitutional restrictions beyond which the Courts would not allow zoning ordinances to go. Judge Delaplaine, in his opinion, delivered a devastating barrage on the practice of the so-called "spot zoning"¹⁶ ordinances (which various city councils have passed for the benefit of a particular special interest), which also throws some light on the same problems as applied to rezoning.

"We now come to the specific question whether the City Council can discriminate in favor of a mortician by permitting him to conduct a funeral home in a

¹¹ See also 54 A. L. R. 1032; *Anne Arundel County v. Ward*, 186 Md. 330, 46 A. 2d 684 (1946); *Colati v. Jirout*, 186 Md. 652, 47 A. 2d 613 (1946).

¹² See *M. & C. C. of Baltimore v. Byrd*, 62 A. 2d 588 (Md., 1948). See also an interesting annotation in 117 A. L. R. 1123 stating:

"The basis of the power to limit the use of real estate to conform to a zoning ordinance is the police power, and the validity of zoning ordinances as a means of promoting the health, safety, morals and general welfare of the community is too well established to warrant discussion. Where, however, the zoning regulations bear no substantial relationship to health, safety, morals, or general welfare, but impose restrictions on the use of private property that are unnecessary and unreasonable, they violate the 14th Amendment and are invalid."

¹³ 277 U. S. 183 (1928).

¹⁴ *Ibid.*, 188. See also *Hoffman v. M. & C. C. of Baltimore*, 79 A. 2d 367, 373 (Md., 1951), citing the *Nectow* case.

¹⁵ 73 A. 2d 486 (Md., 1950).

¹⁶ "Arbitrary and unreasonable devotion of a small area within a zoning district to a use which is inconsistent with the use to which the rest of the district is restricted." *Ibid.*, 488-9.

locality which has long been zoned as residential. The rule adopted in other States, which we follow, is that an amendment to a municipal zoning ordinance that creates a separate commercial district of a single lot of ground to enable an individual to obtain a permit to use his residence on the lot as a funeral home is ordinarily invalid because it provides for unreasonable and discriminatory 'spot zoning' beyond the statutory power of the city."¹⁷

The Court further states:

"The State Zoning Enabling Act demands that all zoning regulations shall be uniform for each class or kind of buildings throughout each district, but the zoning regulations in one district may differ from those in other districts. Code 1939, Art. 66B, Secs. 2, 21. The regulations for the use of property within the various use districts are supported upon the basic theory that they apply equally and uniformly within the district affected. *Invidious distinctions and discriminations in zoning cannot be allowed*, for the very essence of zoning is territorial division according to the character of the land and the buildings, their peculiar suitability for particular uses, and uniformity of use within the use district."¹⁸

The State Zoning Enabling Act provides in Article 66B, Sec. 21(d):¹⁹ "The council shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented, or changed." In Sec. 5 it states: "Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed." From these two sections of the Code and the various statutes pertaining to particular localities are derived the powers of the various municipal governing bodies (i.e., city councils) and county governing bodies (i.e., county commissioners) to rezone the various districts within their jurisdictions. Thus the General Assembly of Maryland has gone one step further than mere general zoning authorization, by passing legislation specifically authorizing the various municipalities and local governments to set up planning commissions to

¹⁷ *Ibid.*, 489.

¹⁸ *Ibid.*, 488; italics added.

¹⁹ Code, 1951.

help their zoning plans keep abreast of the times and various population shifts which are becoming increasingly important in cities today.

In taking up the broad question of the validity or invalidity of a *rezoning* ordinance as opposed to an original zoning ordinance, the "Due Process" clause of the 14th Amendment of the Constitution is a broader protection to the property holder and a greater obstacle to the validity of an "arbitrary rezoning ordinance". In the leading case of *Arverne Bay Construction Co. v. Thatcher*,²⁰ decided by the New York Court of Appeals in 1938 and used as a guide in the Maryland Court of Appeals, Judge Lehman, in holding invalid a New York City ordinance which changed undeveloped property from an unrestricted zone to a restricted residential zone stated:

"We have already pointed out that in the case which we are reviewing, the plaintiff's land cannot at present or in the immediate future be profitably or reasonably used without violation of the restriction. An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."²¹

After reviewing the validity of an amendment to a Zoning Ordinance in Maryland, the first problem we find is the difference, if any, resulting from reclassification from a higher to lower use (i.e., from Residential to Commercial) or vice versa. Maryland's four leading cases on rezoning seem to indicate that there is no distinction, with regard to the effect on validity, between "rezoning up" and "rezoning down".²² These cases furnish an excellent guide as to the general state of the law in Maryland today regarding rezoning.

²⁰ 278 N. Y. 222, 15 N. E. 2d 587, 117 A. L. R. 1110 (1938).

²¹ *Ibid.*, 591-2. This case has been cited in two recent Maryland decisions as a leading authority, i.e., *Northwest Merchants Terminal v. O'Rourke*, 191 Md. 171, 60 A. 2d 743 (1948) and the *Kracke* case being noted.

²² *Chayt v. Maryland Jockey Club*, 179 Md. 390, 18 A. 2d 856 (1941); *Northwest Merchants Terminal v. O'Rourke*, *supra*, n. 21; *Bruning Brothers, Inc. v. M. & C. C. of Baltimore*, 87 A. 2d 589 (Md., 1952); *Kracke v. Weinberg*, 79 A. 2d 387 (Md., 1951).

Chayt v. Maryland Jockey Club,²³ was decided by the Court of Appeals in 1941 and was the first of the "big four" cases referred to above. Briefly it upheld the validity of a rezoning ordinance changing a plot of land owned by and adjoining the Pimlico Race track from residential to commercial use, thereby permitting the track to build stables thereon. In the course of his opinion, Judge Johnson stated: "In order to impose restrictions some valid exercise of the police power must be proven. But such power is invoked for the protection of the property restricted and not to give protection to surrounding property."²⁴ Certain parts of his opinion may suggest that such a reclassification from a higher to lower use was a matter of right.²⁵ However, a careful scrutiny of this case in light of recent cases will disclose an underlying principle not inconsistent with the later cases. One statement of the Court is particularly useful in reconciling this case with later cases. "This Court has, therefore, recognized the right of the Mayor and City Council of Baltimore to change, modify and correct any injustices found to exist under the original Zoning Ordinance."²⁶ In view of the factual finding in the later *Bruning Brothers*²⁷ case, decided by the Court of Appeals early in 1952, it is a distinct possibility that the Court of Appeals could have based its favorable ruling as to the validity of the rezoning ordinance in the *Chayt* case, on the ground that the land was adjacent to a building being used as a non-conforming use and hence rezoning would amount to a mere continuation of such a use.

In *Northwest Merchants Terminal v. O'Rourke*,²⁸ a segment of land adjoining a railroad right-of-way was reclassified "upwards" from commercial to residential. In the railroad segment covered by the rezoning amendment, there were no homes, and, the evidence indicated, there never had been and probably never would be any. According to testimony of expert witnesses houses could be built there, "if you could get anyone foolish enough to do it"²⁹ and any construction for residential purposes would be a losing venture. Accordingly, the Court of Appeals held that the

²³ *Supra*, n. 22.

²⁴ *Ibid*, 395.

²⁵ See Kintner et al. v. Board of Zoning Appeals of Baltimore County, Daily Record, June 28, 1952 (Cir. Ct. Balto. County, 1952).

²⁶ *Supra*, n. 22, 396; italics added.

²⁷ *Supra*, n. 22, discussed more fully *infra*, *circa*, n. 33.

²⁸ *Supra*, n. 21.

²⁹ *Ibid*, 184.

amendment was "unreasonable, arbitrary and contrary to Section 3 of the Zoning Enabling Act."³⁰

In the course of the opinion, Judge Markell cited extensively from Judge Lehman's opinion in the *Arverne Bay*³¹ case and applied the logic of the "Due Process" clause of the Federal Constitution to the facts in this case. The Court stressed the fact that there was a strong presumption as to the validity of the original zoning ordinance:

" 'When appellant passed the original ordinance its powers were not exhausted. It could amend the ordinance. But the power to amend was not arbitrary and could not be exercised merely because someone wanted it done or thought it ought to be done. . . . It could only be exercised when the public good demanded or required that the amendment be made. When appellees bought the land they had a right to rely upon the classification which existed at the time the purchase was made. They also had a right to rely upon the rule of law that the classification would not be changed unless the change was required for the public good' ."³²

In *Bruning Bros., Inc., v. Mayor and City Council*,³³ a question arose as to the validity of a rezoning ordinance passed in 1942 putting plaintiff's 60 foot strip of land in a higher use district (that is, from commercial to residential). The constitutionality of the rezoning ordinance was attacked on the grounds that the land so rezoned was in front of a large paint-manufacturing plant (part of a non-conforming use built in 1944) and was suitable only for industrial purposes. (Although the Court allowed the plaintiff to use his land for industrial purposes on the ground of a mere continuance of a non-conforming use) it held the rezoning ordinance valid, and set down two rules which should be taken into consideration whenever the problem of rezoning arises. First, it held that the rezoning ordinance was valid because the "rezoning was in the nature of the correction of an original error and was not a change in use caused by new circumstances".³⁴ This is in line with the holding of the *Chayt* case cited earlier.³⁵ Secondly, because the plaintiff had built the paint-manufacturing plant all

³⁰ *Ibid.*, 193.

³¹ *Supra*, n. 20.

³² *Supra*, n. 21, 188, quoting *Phipps v. Chicago*, 339 Ill. 315, 327, 171 N. E. 289, 293 (1930).

³³ *Supra*, n. 22.

³⁴ *Ibid.*, 591.

³⁵ *Supra*, *circa*, n. 23.

around his 60 foot plot making it virtually impossible to use the lot in any other manner, the Court stressed the holding of *Gleason v. Keswick Improvement Assn.*,³⁶ and observed that plaintiffs "could not claim they suffered a peculiar hardship that entitled them to a special privilege, where they themselves created the conditions which brought about that situation."³⁷

The instant case³⁸ best ties in the three cases just cited and gives us the firmest foundation on which to work out some sort of pattern as to the validity of a rezoning ordinance today in Maryland. We find that there is a strong presumption that once land is zoned it is zoned correctly, and will only be rezoned to correct an original error, or to comply with a change in circumstances and uses of the neighborhood to the extent that such action is necessary to protect public health, safety and welfare. We also find that the Courts will not sustain rezoning (or a refusal to rezone) merely to set up (or maintain) arbitrary buffer zones to protect residents outside of the area in contention.³⁹ Along this line, the Maryland Court of Appeals is particularly zealous in protecting a taxpayer's property when the rezoning would deprive him of all reasonable use of the land and thus amount to taking of property without due process of law. From another approach, the Courts will not tolerate the individual landowner's use of his own surrounding land in such a manner as to depreciate his remaining land to the point where it can't be used profitably as it is then zoned.⁴⁰

Although at present the vast majority of litigation involving the constitutionality of a rezoning ordinance has come out of Baltimore City, the growing trend of the population to move to the urban areas is likely to cause more and more instances of zoning problems in the counties. Two such cases were decided in Baltimore and Anne Arundel Counties in 1952. In the case of *Kintner, et al. v. Board of Zoning Appeals of Baltimore County*,⁴¹ Judge Howard Murray overruled the decision of the Board of Zoning Appeals, thereby affirming the Zoning Commissioner of the County who had refused a motion for reclassification of 122 acres from residential to commercial and lower residential.

³⁶ 78 A. 2d 164 (Md., 1951).

³⁷ *Supra*, n. 22, 592.

³⁸ *Kracke v. Weinberg*, *supra*, n. 22.

³⁹ See *Northwest Merchants Terminal v. O'Rourke*, *supra*, n. 21 and cases cited in n. 22, *supra*.

⁴⁰ See *Bruning Bros., Inc. v. M. & C. C. of Baltimore*, *supra*, n. 22, and *Gleason v. Keswick Improvement Ass'n.*, *supra*, n. 36.

⁴¹ *Supra*, n. 25.

The Board of Zoning Appeals gave no reasons for its action in reclassifying, merely stating that such reclassification would not jeopardize the public health, safety, welfare and morals. Accordingly, Judge Murray held that such a rezoning without any legal basis or justification falls into the category of being arbitrary.

The Anne Arundel County case, *Banner, et al. v. The Home Sales Company, et al.*,⁴² involved a slightly different factual setup in that the amendments were made before the original zoning plan was submitted for adoption. The Court in upholding the zoning plan stressed the marked difference between original zoning, where the presumption is that the County Commissioners did not act unreasonably and the ordinance is not discriminatory, and rezoning, where a counter-presumption exists to the effect that the original ordinance can only be changed because of error or change in environment. The Court, by this decision did, however, imply that any ruling by the Zoning Board should not be too lightly considered.

In a comment appearing in part in the Real Estate Building News,⁴³ Honorable F. Murray Benson, of the Baltimore Bar, discussed the *Kintner*⁴⁴ case and the *Banner*⁴⁵ case in light of zoning trends in Maryland. In commenting on the Baltimore County case, the author indicated that any attempts to have a rezoning amendment would need extensive legal preparation.

"The court places great emphasis upon the type of record that must be submitted in order to justify the action of the Board of Zoning Appeals in the adoption of the amendment. It is not enough that it be shown that the sole objection raised against the rezoning was on the part of surrounding property owners nor that the Board found that these restrictions were not necessary for the protection of the property involved in the restriction or for the protection of the public health, safety, morals and general welfare. The court has almost said here that the welfare of adjoining residents and the public welfare are synonymous. The amendment is stricken down because it is not affirmatively found to be necessary because of an error in the original zoning and/or a change of conditions which make such amendment necessary. There is a presumption of the

⁴² Daily Record, June 30, 1952 (Cir. Ct. Anne Arundel County, 1952).

⁴³ August, 1952 (Baltimore), pp. 37-38.

⁴⁴ *Supra*, n. 25.

⁴⁵ *Supra*, n. 42.

correctness of the original regulation and there is no counter-presumption in favor of the amendment. This is tantamount to saying that the Board need not document its original determination that the original zoning was in accordance with a comprehensive plan but that it must document any resolution amending the original zoning and argue affirmatively that it is made necessary by one or the other of the reasons above cited."

Mr. Benson's comment, which the Real Estate Building News could not publish in full, also contained the following statement:

"This makes an application for rezoning in Baltimore County a highly technical proceeding hardly to be attempted by any citizen without the assistance of able, legal and zoning counsel. The record must be carefully prepared and the Board must be urged to adopt a resolution in such form as that it will show that it has made a determination upon evidence to be set up in the resolution and has determined the necessity by the application of guides and standards also set forth in the resolution."

From the *Banner*⁴⁶ case, Mr. Benson feels that the finding of the Legislative Board will be given greater weight and there would be less demand for extensive evidence to be presented in the original Zoning Case. He says:

"In the comments of the court, there is evidence of great respect for legislative findings and the reluctance of the court to disturb them except in cases where there is unquestioned evidence of spot-zoning. This opinion does not say that in a rezoning case the court will not carefully scrutinize the findings of the Board of Zoning Appeals. It does indicate that those findings will be given greater weight by the court in view of the fact that they are legislative and that the Board is presumed to be better qualified to draw lines between the various use districts than the court."

By way of conclusion, we find that, although the Court of Appeals has ruled that a zoning ordinance will not be changed except for original error or a change in the neighborhood warranting it, we have no clean-cut decision on

⁴⁶ *Ibid.*

whether or not the Courts will sustain a Zoning Authority's opinion without supporting evidence.

Under ordinary circumstances, the Courts are inclined to give great weight to the findings of an administrative body and are reluctant to reverse them unless they are clearly arbitrary.⁴⁷ However, in view of the cases already handed down by the Court of Appeals of Maryland stressing the strong presumption that once land is zoned it can only be rezoned to correct an original error or because of the change in surroundings, I think it safe to predict that the Court of Appeals will follow the leaning of Judge Murray's decisions and require that the legislative board, in order to justify a rezoning classification, must have concrete facts and evidence presented before it which will sustain its decision on appeal to the Courts, and that without such evidence the Courts will be justified in overruling the reclassification as being legally arbitrary. As a result, the mere recitation alone by an administrative board that the reclassification would not jeopardize the public health, safety, welfare, and morals will not be sufficient evidence to sustain the reclassification in the event of appeal to the Courts, and it becomes extremely important for any attorney seeking a rezoning classification to have all his evidence prepared and presented to the administrative body.

⁴⁷ *Heaps v. Cobb*, 185 Md. 373, 45 A. 2d 73 (1945); *Johnstown Coal and Coke Co. v. Dishong*, 84 A. 2d 847 (Md., 1951).